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Jan'y 29 1877

Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 178.

GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

VS.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY.

No. 179.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

GEORGE Q. ERSKINE, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

[illegible]

FILED OCTOBER 17, 1874.

Feb 28 1877

Aff'd

Chief Justice

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1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the fifth day) of January, A. D. 1874. Present the honorable James H. Hovee, district judge presiding, Charles L. Hamilton, marshal, Edward Kurtz, clerk.

Among other the following proceedings were had, to wit:

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY, plaintiff,
vs.
GEORGE Q. ERSKINE, DEFENDANT.
} At law.

Be it remembered that heretofore, to wit, on the twenty-eighth day of May, A. D. 1872, came the above-named defendant and presented to the clerk (court not being in session) his petition in writing as herein filed, duly verified by affidavit, together with a certificate of counsel as required
by law, praying that a writ of certiorari may issue to the circuit
2 court for Milwaukee County, in the State of Wisconsin, requiring
said court to send to this court the record and proceedings in the above-entitled cause in said court, the defendant being collector of internal revenue for the 1st collection-district in this State, which petition is as follows:

Petition for writ of certiorari.

STATE OF WISCONSIN,
Milwaukee County Circuit:

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
GEORGE Q. ERSKINE.

To the judges of the circuit court of the United States for the eastern district of Wisconsin:

Your petitioner, George Q. Erskine, respectfully represents, that he is the defendant in the above-entitled action; that said action is brought against him by the plaintiff therein for the recovery of seventeen thousand two hundred and ninety-six dollars and twelve cents, collected and received by your petitioner from the said plaintiff in the year 1870, as a tax upon interest upon certain bonds of the said plaintiff, theretofore issued by said plaintiff, with coupons annexed, and which said plaintiff
was liable to pay and did pay, and which tax said plaintiff claims
3 to have paid under protest; and also, for the recovery of divers
other large sums of money, collected and received by your petitioner of said plaintiff, as taxes under the laws of the United States, and which the said plaintiff claims to have paid in like manner under protest.

And your petitioner further represents that in the collection of each and all of the aforesaid taxes, he acted as collector of internal for the first district of the State of Wisconsin, being duly and lawfully authorized to act in that capacity under the laws of the United States, and your petitioner prays that said action may be removed to the circuit court of the United States.

G. Q. ERSKINE.

EASTERN DISTRICT OF WISCONSIN,
County of Milwaukee, ss:

George Q. Erskine being duly sworn, deposes and says that he is the petitioner named in the foregoing petition, and who signed the same; and that said petition is true in substance and fact.

GEORGE Q. ERSKINE.

Subscribed and sworn to this 28th day of May, 1872, before me.

EDWARD KURTZ, *Clerk.*

EASTERN DISTRICT OF WISCONSIN, *ss:*

I, Levi Hubbell, of said district, hereby certify that I am the attorney
of the United States in and for said district and counsel for the
4 petitioner named in the foregoing petition; that I have examined
the proceedings against him and carefully inquired into all the
matters set forth in said petition, and believe the same to be true.

Dated May 27th, 1872.

LEVI HUBBELL,
U. S. Atty. Eastern Dist. of Wisconsin.

Whereupon a writ of certiorari issued (in duplicate) as follows:

Certiorari.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

[SEAL.] The President of the United States of America to the circuit court for Milwaukee County, in the State of Wisconsin, greeting:

Whereas, George Q. Erskine, defendant, in a certain cause in said circuit court for Milwaukee County, wherein the Milwaukee & St. Paul Railway Company is plaintiff, pursuant to section sixty-seven of an act of Congress, entitled "An act to reduce internal taxation, and to amend an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes approved June 30, 1864,' and acts amendatory thereof," approved July 13, 1866, has this day presented to the clerk of the circuit court of the United States for the eastern district of Wisconsin, (said court not being is session,) his petition duly verified by affidavit, setting forth that said suit
was brought against him as collector of internal revenue for the
5 first district of the State of Wisconsin, for the recovery of cer-
tain monies collected and received by him from the plaintiff for
taxes under the laws of the United States, and which the plaintiff claims to have paid under protest, together with a certificate signed by an attorney of said court, that as counsel for the petitioner he has examined the proceedings against him and carefully enquired into all the matters set forth in the petition, and that he believes the same to be true:

Now, therefore, you are hereby commanded that you send the record and proceedings in said cause, wherein the Milwaukee & St. Paul Railway Company is plaintiff, and George Q. Erskine is defendant, so full and entire as in said circuit court for Milwaukee County they remain, to the circuit court of the United States for the eastern district of Wisconsin, without delay, together with this writ.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at the city of Milwaukee, in said eastern district of Wisconsin, this 28th day of May, A. D. 1872, and of our Independence the ninety-sixth.

EDWARD KURTZ,
Clerk U. S. Circuit Court East'n Dist. of Wis.

Marshal's return to certiorari.

6 Certiorari returned. Served on the within-named the circuit court for Milwaukee County, by delivering personally to James Hickox, clerk of said court, a duplicate of this writ of certiorari, this 31st day of May, 1872.

C. S. HAMILTON, *Marshal*,
By C. H. HAMILTON, *Deputy.*

Fees, $2.06.

AUGUST 3, 1872.

Certified copy of record and proceedings in the circuit court for Milwaukee County, as return to writ of certiorari, filed as follows:

Pleas before the honorable David W. Small, judge of the second judicial circuit, State of Wisconsin, and presiding judge of the circuit court, within and for the county of Milwaukee, in said State, at a term of said court begun and holden at the court-house in the city of Milwaukee, on the first Monday of May, A. D. 1872. Wm. G. Parsons, sheriff. James Hickox, clerk.

MILWAUKEE & SAINT PAUL RAILWAY COMPANY
against
GEORGE Q. ERSKINE.

Be it remembered that heretofore, to wit, on the 23d day of May, A. D. 1872, comes the said plaintiff, by its attorneys, and files in the office of the clerk of the circuit court aforesaid its certain summons, in the words and figures following, to wit:

7 Circuit court, Milwaukee County.

MILWAUKEE & ST. PAUL RAILWAY COMPANY
against
GEORGE Q. ERSKINE.

The State of Wisconsin to the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the circuit court of the county of Milwaukee, at the clerk's office in the city of Milwaukee, and to serve a copy of your answer to the said complaint on the subscribers, at their office in Mitchell's Bank Building, in the city

of Milwaukee and State of Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will take judgment against you, for the sum of one hundred and twenty five thousand seven hundred and eighty dollars and fifty cents, with interest from the 28 day of February, A. D. 1870, on seventeen thousand two hundred and ninety-six dollars and twelve cents of said sum, with interest from the 30 day of July, A. D. 1870, on thirty-one thousand one hundred and five dollars and seventy cents of said sum, with interest from the 30 day of July, A. D. 1870, on forty-five thousand six hundred and three dollars and ninety-
8 five cents of said sum, with interest from the 31 day of May, A. D. 1871, on twenty-seven thousand six hundred and thirty dollars and twenty cents of said sum, and with interest from the 13 day of September, A. D. 1871, on four thousand one hundred and forty-four dollars and fifty-three cents of said sum, besides the costs of this action.

Dated March 13, 1872.

CARYS & COTTRILL,
Plaintiff's Attorneys.

I hereby admit service of the within summons upon me, this 15 day of March, A. D. 1872.

GEO. Q. ERSKINE.

MAY 31, 1872.—Writ of certiorari from circuit court of the United States for the eastern district of Wisconsin filed.

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, James Hickox, clerk of said court, do hereby certify that I have compared the foregoing copy with the original record and proceedings entered in the action therein entitled; that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 13th day of June, A. D. 1872.

9 [SEAL.] JAMES HICKOX, *Clerk.*

STATE OF WISCONSIN,
County of Milwaukee, ss:

I, David W. Small, do hereby certify that I am judge of the second judicial circuit, said State, and presiding judge of the circuit court within and for the county of Milwaukee; that James Hickox, whose name is subscribed to the certificate subjoined to the within record, is and was at the date of said certificate, clerk of the circuit court for the county of Milwaukee and State aforesaid, duly elected and qualified; that I am well acquainted with his handwriting, and know the signature to be genuine; and, further, that said certificate or attestation is in due form of law, and that the seal thereto attached is the proper seal of said court.

Witness my hand at Milwaukee, in said county, this 13th day of June, A. D. 1872.

DAVID W. SMALL,
Circuit Judge, 2d Judicial Circuit of Wisconsin.

Duplicate.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

[SEAL.] The President of the United States of America to the circuit court for Milwaukee County, in the State of Wisconsin, greeting:

Whereas George Q. Erskine, defendant in a certain cause in
10 said circuit court for Milwaukee County, wherein the Milwaukee
& St. Paul Railway Company is plaintiff, pursuant to section sixty-seven of an act of Congress entitled "An act to reduce internal taxation, and to amend an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' approved June 30, 1864, and acts amendatory thereof," approved July 13, 1866, has this day presented to the clerk of the circuit court of the United States for the eastern district of Wisconsin (said court not being in session) his petition, duly verified by affidavit, setting forth that said suit was brought against him as collector of internal revenue for the first district of the State of Wisconsin, for the recovery of certain monies collected and received by him from the plaintiff for taxes under the laws of the United States, and which the plaintiff claims to have paid under protest, together with a certificate signed by an attorney of said court, that, as counsel for the petitioner, he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes the same to be true:

Now, therefore, you are hereby commanded that you send the record and proceedings in said cause, wherein the Milwaukee & St. Paul Railway Company is plaintiff and George Q. Erskine is defendant,
11 so full and entire as in said circuit court for Milwaukee County
they remain, to the circuit court of the United States for the eastern district of Wisconsin, without delay, together with this writ.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at the city of Milwaukee, in said eastern district of Wisconsin, this 28th day of May, A. D. 1872, and of our Independence the ninety-sixth.

EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. of Wis.

AUGUST 5, 1872.—This day came the plaintiff, by its attorneys, Messrs. Carys & Cottrill, and filed its declaration, as follows:

12 *Declaration.*

United States circuit court, eastern district of Wisconsin.

MILWAUKEE & ST. PAUL RAILWAY COMPANY
against
GEORGE Q. ERSKINE.
} Of the first Monday of August, 1872.

EASTERN DISTRICT OF WISCONSIN, *ss:*

The Milwaukee and St. Paul Railway Company, a corporation created, organized, and existing under and by virtue of the laws of the State of Wisconsin, by Carys & Cottrill, its attorneys, complains of George Q. Erskine, collector of internal revenue for the first collection-district of the State of Wisconsin, of a plea of trespass on the case upon promises.

For that whereas said plaintiff at the dates and times hereinafter mentioned was a corporation as aforesaid, and had its principal office or place of business in the city of Milwaukee, and State of Wisconsin; and whereas, heretofore, to wit, on the first day of January, A. D. 1870, said plaintiff was indebted to divers persons in large sums of money upon the bonds of said plaintiff theretofore issued by said plaintiff, and also upon bonds issued by other railroad companies, and which were a lien upon the property of said plaintiff, and by virtue of which said lien said plaintiff was obliged to pay the interest accruing upon said
13 bonds in order to protect its property; and whereas, on the said first day of January, A. D. 1870, there fell due and became payable upon the said bonds of said plaintiff, and said other bonds, interest to the amount of three hundred and forty-five thousand nine hundred and twenty-two dollars and fifty cents, and which said interest was represented by coupons attached to said bonds, and which said coupons said plaintiff on the said first day of January, A. D. 1870, became liable and bound to pay; and whereas, on or about the 31st day of January, A. D. 1870, George B. Bingham, who was then the assessor of internal revenue of the United States for the first collection-district in said State of Wisconsin, as such assessor assessed on said plaintiff in respect to said interest which fell due and became payable on the said first day of January, A. D. 1870, a pretended income-tax of five per centum of the amount of said interest, which said pretended tax amounted to the sum of seventeen thousand two hundred and nin'ty-six dollars and twelve cents, whereas in truth and in fact there was no law authorizing the assessment of said tax, or any tax to the United States upon said plaintiff in respect to said interest, and said plaintiff was not liable to be assessed for said tax or to pay the same, and protested against said
14 assessment, and said tax was illegal and void and without authority of law; and whereas said defendant at the time of the said assessment of said pretended tax was, ever since that time has been, and now is, the collector of internal revenue of the United States for said collection-district; and whereas, on or about the 28th day of February, A. D. 1870, at said city of Milwaukee, in said State of Wisconsin, said plaintiff was compelled to and did pay to said defendant, as such collector, under protest, the said pretended and illegal tax of seventeen thousand two hundred and nin'ty-six dollars and twelve cents; and whereas, afterwards, to wit, on or about the 26th day of September, A. D. 1871, said plaintiff made an appeal to the Commissioner of Internal Revenue of the United States from the said erroneous and illegal assessment upon and collection of said plaintiff of said pretended tax, which said appeal was made according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury of the United States, established in pursuance thereof, and by which said appeal said plaintiff claimed and demanded that said Commissioner of Internal Revenue should remit, refund, and pay back to said plaintiff the tax, so as
15 aforesaid erroneously and illegally assessed upon and collected of said plaintiff; that said Commissioner of Internal Revenue entertained said appeal, and on or about the 29th day of January, A. D. 1872, decided the same adversely to said plaintiff; and whereas this suit was brought by said plaintiff against said defendant within six months from the time of the decision of said Commissioner of Internal Revenue upon said appeal, by means of which said several premises the said defendant then and there became liable to re-imburse and pay back to said plaintiff the said sum of money, to wit, the sum of seventeen thousand two hundred and nin'ty-six dollars and twelve cents, which

said plaintiff had so as aforesaid been compelled to and did pay to said defendant, under protest, for the said pretended and illegal tax so as aforesaid assessed upon said plaintiff in respect to said interest; and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the first day of February, A. D. 1872, at the city of Milwaukee aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it, the said last-mentioned sum of money, when he, the said defendant, should be thereunto afterwards requested; yet
the said defendant, although often requested, &c., hath not yet
16 paid the said sum of money last above mentioned, or any part
thereof, to the said plaintiff, but to pay the same, or any part
thereof, to the said plaintiff, the said defendant hath hitherto altogether refused, and still does refuse.

And for that whereas said plaintiff at the dates and times hereinafter mentioned was a corporation as aforesaid, and had its principal office or place of business in the city of Milwaukee aforesaid; and whereas, heretofore, to wit, from and including the 2nd day of January, A. D. 1870, up to and including the 1st day of July, A. D. 1870, said plaintiff was indebted to divers persons in large sums of money upon the bonds of said plaintiff theretofore issued by said plaintiff, and also upon bonds issued by other railroad companies, and which were a lien upon the property of said plaintiff, and by virtue of which said lien said plaintiff was obliged to pay the interest accruing upon said bonds in order to protect its property; and whereas, at various dates and times, from and including the said 2nd day of January, A. D. 1870, up to and including the said 1st day of July, A. D. 1870, there matured upon the said bonds of said plaintiff, and said other bonds, interest
to the amount of six hundred and twenty-two thousand one
17 hundred and fourteen dollars, and which said interest was represented by coupons attached to said bonds, and which said coupons said plaintiff at the said various dates and times of the maturity of said interest became liable and bound to pay; and whereas George B. Goodwin, who was then the assessor of internal revenue of the United States for the said first collection-district in said State of Wisconsin, as such assessor, upon the monthly lists of assessments bearing date the 30th day of June, A. D. 1870, assessed on said plaintiff, in respect to the aforesaid interest, a pretended income-tax of five per centum of the amount of said interest, which said pretended tax amounted to the sum of thirty-one thousand one hundred and five dollars & seventy cents; whereas in truth and in fact there was no law authorizing the said assessment of said tax, or any tax to the United States upon said plaintiff in respect to said interest, and said plaintiff was not liable to be assessed for said tax, or to pay the same, and protested against said assessment, and said tax was illegal and void and
without authority of law; and whereas said defendant, at the
18 time of the said assessment of said pretended tax, was, ever since
that time has been, and now is collector of internal revenue as aforesaid; and whereas, on or about the 30th day of July, A. D. 1870, at the city of Milwaukee aforesaid, said plaintiff was compelled to and did pay to said defendant, as such collector, under protest, the said pretended and illegal tax of thirty-one thousand one hundred and five dollars and seventy cents; and whereas afterwards, to wit, on or about the 26th day of September, A. D. 1871, said plaintiff made an appeal to the Commissioner of Internal Revenue of the United States from the said erroneous and illegal assessment upon and collection of said plaintiff of said pretended tax, which said appeal was made according to the

provisions of law in that regard, and the regulations of the Secretary of the Treasury of the United States established in pursuance thereof, and by which said appeal said plaintiff claimed and demanded that said Commissioner of Internal Revenue should remit, refund, and pay back to said plaintiff the tax so as aforesaid erroneously and illegally assessed upon and collected of said plaintiff; that said Commissioner of
Internal Revenue entertained said appeal, and on or about the
19 29th day of January, A. D. 1872, decided the same advers'ly to
said plaintiff; and whereas this suit was brought by said plaintiff against said defendant within six months from the time of the decision of said Commissioner of Internal Revenue upon said appeal, by means of which said several premises the said defendant then and there became liable to re-imburse and pay back to said plaintiff the said sum of money, to wit, the sum of thirty-one thousand one hundred and five dollars and seventy cents, which said plaintiff had, so as aforesaid, been compelled to and did pay to said defendant, under protest, for the said pretended and illegal tax so as aforesaid assessed upon said plaintiff in respect to said interest; and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the 1st day of February, A. D. 1872, at the city of Milwaukee aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it, the said last-mentioned sum of money, when he, the said defendant, should be thereunto afterwards requested; yet the said defendant, although often requested, &c., hath not yet paid the said sum of money last above mentioned or any part thereof to the said plaintiff, but to pay the
20 same, or any part thereof, to the said plaintiff, the said defendant
hath hitherto altogether refused, and still does refuse.

And for that whereas said plaintiff at the dates and times hereinafter mentioned was a corporation as aforesaid, and had its principal office or place of business in the city of Milwaukee aforesaid; and whereas, prior to the 19th day of January, A. D. 1870, said plaintiff had issued to its stockholders its capital stock in two classes, known as common and preferred, & on said last-mentioned date said stock was owned and held by divers and numerous persons; and whereas, on the said 19th day of January, A. D. 1870, the board of directors of said plaintiff declared a cash dividend upon the said common and preferred stocks of said plaintiff to the amount of nine hundred and twelve thousand and seventy-nine dollars, and made said dividend payable to the owners & holders of said stock on the 15th day of February, A. D. 1870; and whereas, on the 30th day of June, A. D. 1870, at said city of Milwaukee, the said George B. Goodwin, as such assessor as aforesaid, assessed on said plaintiff, in respect to the aforesaid dividend, a pretended income tax of, five per
centum of the amount of said dividend, which said pretended tax
21 amounted to the sum of forty-five thousand six hundred and three
dollars and nin'ty-five cents; whereas in truth and in fact there was no law authorizing the said assessment of said tax, or any tax to the United States upon said plaintiff, in respect to said dividend, and said plaintiff was not liable to be assessed for said tax or to pay the same, & protested against said assessment, and said tax was illegal and void and without authority of law; and whereas said defendant, at the time of the said assessment of said pretended tax, was ever since that time has been, and now is, collector of internal revenue as aforesaid; and whereas, on or about the 30th day of July, A. D. 1870, at the city of Milwaukee aforesaid, said plaintiff was compelled to and did pay to said defendant as such collector, under protest, the said pretended and illegal tax of forty five thousand six hundred and three dollars and nin'ty-

five cents. And whereas, afterwards, to wit, on or about the 26th day of September, A. D. 1871, said plaintiff made an appeal to the Commissioner of Internal Revenue of the United States from the said er-
22 roneous and illegal assessment upon and collection of said plaint-
iff of said pretended tax, which said appeal was made according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury of the United States established in pursuance thereof, and by which said appeal said plaintiff claimed and demanded that said Commissioner of Internal Revenue should remit, refund, and pay back to said plaintiff the tax so as aforesaid erroneously and illegally assessed upon and collected of said plaintiff; that said Commissioner of Internal Revenue entertained said appeal, and on or about the 13th day of February, A. D. 1872, decided the same adversely to said plaintiff; and whereas this suit was brought by said plaintiff against said defendant within six months from the time of the decision of said Commissioner of Internal Revenue upon said appeal, by means of which said several premises the said defendant then and there became liable to reimburse and pay back to said plaintiff the said sum of money, to wit, the sum of forty-five thousand six hundred and three dollars and nin'ty-five cents, which said plaintiff had so as aforesaid been compelled to and did pay to said defendant, under protest, for the said pre-
23 tended and illegal tax so as aforesaid assessed upon said plaintiff
in respect to said interest; and being so liable he, the said defendant, in consideration thereof, afterwards, to wit, on the 1st day of March, A. D. 1872, at the city of Milwaukee aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay it the said last-mentioned sum of money, when he, the said defendant, should be thereunto afterwards requested; yet the said defendant, although often requested, &c., hath not yet paid the said sum of money last above mentioned, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiff, the said defendant hath hitherto altogether refused, & still does refuse.

And for that whereas said plaintiff at the dates and times hereinafter mentioned was a corporation as aforesaid, and had its principal office or place of business in the city of Milwaukee aforesaid; and whereas, prior to the 19th day of January, A. D. 1870, said plaintiff had issued to its stockholders its capital stock in two classes, known as common and preferred, and on said last-mentioned date said stock was owned & held by divers and numerous persons; and whereas,
24 on the said 19th day of January, A. D. 1870, the board of directors
of said plaintiff declared a dividend upon the said common and preferred stocks of said plaintiff to the amount of eight hundred & twenty-eight thousand nine hundred and six dollars, and made the same payable on the 14th day of February, A. D. 1870, in the common stock of said plaintiff at its par or nominal value.

And whereas, on the 30th day of June, A. D. 1870, at said city of Milwaukee, the said George B. Goodwin, as such assessor as aforesaid, assessed on said plaintiff in respect to the aforesaid dividend a pretended income tax of five per centum of the amount of said dividend; which said pretended tax amounted to the sum of forty-one thousand four hundred and forty-five dollars and thirty cents, whereas, in truth and in fact, there was no law authorizing the said assessment of said tax or any tax to the United States upon said plaintiff in respect to said dividend, and said plaintiff was not liable to be assessed for said tax or to pay the same, and protested against said assessment, and said tax was illegal and void and without authority of law; and whereas, after-

25 wards, said plaintiff took an appeal from said assessment to the said Commissioner of Internal Revenue; that said Commissioner entertained said appeal, and decided thereon that as said dividend was payable in the common stock of said plaintiff, said assessment should only be five per centum of the actual cash value of said stock dividend at the date it became payable, and that said Commissioner ascertained and fixed the said actual cash value of said stock dividend at the sum of five hundred and fifty-two thousand six hundred and four dollars, and assessed against said plaintiff thereon a pretended income tax of five per centum thereof, which said pretended tax amounted to the sum of twenty-seven thousand six hundred and thirty dollars and twenty cents, whereas in truth and in fact there was no law authorizing the said assessment of said tax, or any tax to the United States upon said plaintiff in respect to said dividend, and said plaintiff was not liable to be assessed for said tax or to pay the same, and said tax was illegal and void and without authority of law; and whereas said defendant, at the time of the said assessment of the said pretended tax, was, ever 26 since that time has been, and now is, collector of internal revenue as aforesaid; and whereas afterwards, to wit, on or about the 31st day of May, A. D. 1871, at the city of Milwaukee aforesaid, said plaintiff was compelled to and did pay to said defendant as such collector, under protest, the said pretended and illegal tax of twenty-seven thousand six hundred and thirty dollars and twenty cents; and whereas afterwards, to wit, on or about the 26th day of September, A. D. 1871, said plaintiff made an appeal to the Commissioner of Internal Revenue of the United States from the said erroneous and illegal assessment upon and collection of said plaintiff of said pretended tax, which said appeal was made according to the provisions of law in that regard and the regulations of the Secretary of the Treasury of the United States established in pursuance thereof, and by which said appeal said plaintiff claimed and demanded that said Commissioner of Internal Revenue should remit, refund, and pay back to said plaintiff the tax so as aforesaid erroneously and illegally assessed upon and collected of said plaintiff; that said Commissioner of Internal Revenue entertained said appeal, and on or about the 29th day of January, 27 A. D. 1872, decided the same adversely to said plaintiff; and whereas this suit was brought by said plaintiff against said defendant within six months from the time of the decision of said Commissioner of Internal Revenue upon said appeal, by means of which said several premises the said defendant then and there became liable to reimburse and pay back to said plaintiff the said sum of money, to wit, the sum of twenty-seven thousand six hundred and thirty dollars and twenty cents, which said plaintiff had so as aforesaid been compelled to and did pay to said defendant, under protest, for the said pretended and illegal tax so as aforesaid assessed upon said plaintiff in respect to said interest; and being so liable he, the said defendant, in consideration thereof, afterwards, to wit, on the 1st day of March, A. D. 1872, at the city of Milwaukee aforesaid, undertook and then and there faithfully promised the said plaintiff to pay it the last-mentioned sum of money, when he, the said defendant, should be thereunto afterwards requested, yet the said defendant, although often requested, &c., hath not yet paid the said sum of money, last above mentioned, or any part there- 28 of, to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiff, the said defendant hath hitherto altogether refused, and still does refuse.

And for that whereas said plaintiff, at the dates and times hereinafter

mentioned, was a corporation as aforesaid, and had its principal office or place of business in the city of Milwaukee aforesaid; and whereas prior to the 19th day of January, A. D. 1870, said plaintiff had issued to its stockhold'rs its capital stock in two classes, known as common and preferred, and on said last-mentioned date said stock was owned and held by divers and numerous persons; and whereas, on the said 19th day of January, A. D. 1870, the board of directors of said plaintiff declared a dividend upon the said common and preferred stocks of said plaintiff to the amount of eight hundred and twenty-eight thousand nine hundred and six dollars, and made the same payable on the 14th day of February, A. D. 1870, in the common stock of said plaintiff at its par or nominal value; and whereas, on the 30th day of June, A. D. 1870, at said city of Milwaukee, the said George B. Goodwin, as such assessor
as aforesaid, assessed on said plaintiff, in respect to the aforesaid
29 dividend, a pretended income-tax of five per centum of the amount
of said dividend, which said pretended tax amounted to the sum of forty-one thousand four hundred and forty five dollars and thirty cents, whereas in truth and in fact there was no law authorizing the said assessment of said tax, or any tax to the United States upon said plaintiff in respect to said dividend, and said plaintiff was not liable to be assessed for said tax, or to pay the same, and protested against said assessment, and said tax was illegal and void, and without authority of law; and whereas afterwards, to wit, on or about the 30th day of July, A. D. 1870, said plaintiff took an appeal from said assessment to the said Commissioner of Internal Revenue, who entertained said appeal, and held the same under advisement until on or about the 16th day of March, A. D. 1871, upon which last-mentioned date the said Commissioner decided upon said appeal that, as said dividend was payable in the common stock of said plaintiff, said assessment should only be five per centum of the actual cash value of said stock-dividend at the date it became payable, and that said Commissioner then ascertained and
fixed the said actual cash-value of said stock-dividend at the sum of
30 five hundred and fifty-two thousand six hundred and four dollars,
and assessed against said plaintiff thereon a pretended income-tax of five per centum thereof, which said pretended tax amounted to the sum of twenty-seven thousand six hundred and thirty dollars and twenty cents, whereas in truth and in fact there was no law authorizing the said assessment of said tax, or any tax, to the United States upon said plaintiff in respect to said dividend, and said plaintiff was not liable to be assessed for said tax or to pay the same, and said tax was illegal and void and without authority of law; and whereas said defendant at the time of the said assessment of the said pretended tax was, ever since that time, has been, and now is, collector of internal revenue as aforesaid; and whereas afterwards, to wit, on or about the 20th day of March, A. D. 1871, at the city of Milwaukee aforesaid, said defendant, as such collector as aforesaid, notified the said plaintiff in writing of the said decision of said Commissioner on said appeal, and that the said pretended tax of twenty-seven thousand six hundred and thirty dollars and twenty cents would be due and payable to him, the said defendant, as such collector as aforesaid, on or before the 31st day
of March, A. D. 1871; and whereas said plaintiff did not pay said
31 last-mentioned pretended tax to said defendant, as such collector
as aforesaid, until the 31 day of May, A. D. 1871, by reason whereof said defendant, as such collector as aforesaid, imposed a penalty of five per centum of the amount of said last-mentioned pretended tax upon said plaintiff, which said penalty amounted to the sum of one

thousand three hundred and eighty-one dollars and fifty-one cents; and
whereas said defendant, as such collector as aforesaid, also charged said
plaintiff with ten months' interest on said last-mentioned pretended tax
at the rate of twelve per centum per annum, which said interest
amounted to the sum of twenty-seven hundred and sixty-three dollars
and two cents, whereas in truth and in fact there was no law authorizing
said defendant, as such collector, to impose said penalty upon, or
charge said interest against, said plaintiff, and said plaintiff protested
against the same, and said penalty and interest were illegal and void
and without the authority of law. And whereas afterwards, to wit, on
or about the 13th day of September, A. D. 1871, at the city of Milwaukee
aforesaid, said plaintiff was compelled to and did pay to said
32 defendant, as such collector, under protest, the said penalty and
interest, amounting in the aggregate to the sum of four thousand
one hundred and forty-four dollars and fifty-three cents. And whereas
afterwards, to wit, on or about the 26th day of September, A. D. 1871,
said plaintiff appealed to the said Commissioner of Internal Revenue of
the United States from the said errouneous and illegal imposition upon
and collection of said plaintiff of said penalty, and also from the said
erroneous and illegal charge against and collection of said plaintiff of
said interest upon said last-mentioned pretended tax, which said appeal
was made according to the provisions of law in that regard and the
regulations of the Secretary of the Treasury of the United States, established
in pursuance thereof, and by which said appeal said plaintiff
claimed and demanded that said Commissioner of Internal Revenue
should remit, refund, and pay back to said plaintiff the said penalty and
interest, so as aforesaid erroneously and illegally imposed upon, charged
against, and collected of said plaintiff; that said Commissioner of Internal
Revenue entertained said appeal, and on or about the 29th day of
January, A. D. 1872, decided the same adversely to said plaintiff.
33 And whereas this suit was brought by said plaintiff against said
defendant within six months from the time of the decision of said
Commissioner of Internal Revenue upon said appeal, by means of which
said several premises the said defendant then and there became liable
to re-imburse and pay back to said plaintiff the said sum of money, to
wit, the sum of four thousand one hundred and forty-four dollars and
fifty-three cents, which said plaintiff had so as aforesaid been compelled
to and did pay to said defendant, under protest, for the said erroneous
and illegal penalty and interest, so as aforesaid imposed upon and
charged against said plaintiff; and, being so liable, he, the said defendant,
in consideration thereof, afterwards, to wit, on the 1st day of March,
A. D. 1872, at the city of Milwaukee aforesaid, undertook and then and
there faithfully promised the said plaintiff to pay it, the last-mentioned
sum of money, when he, the said defendant, should be thereunto afterwards
requested; yet the said defendant, although often requested, &c.,
hath not yet paid the said sum of money last-above mentioned, or
34 any part thereof, to the said plaintiff, but to pay the same, or any
part thereof, to the said plaintiff the said defendant hath hitherto
altogether refused, and still does refuse.

For that whereas the said defendant on the first day of March, in the year one thousand eight hundred and seventy-two, at the said city of Milwaukee, in said State of Wisconsin, was indebted to the said plaintiff in the sum of two hundred thousand dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiff by the said plaintiff before that time done, performed, and bestowed, in and about the business of the said defendant and for the said defendant, and at the special instance and request of the said defendant, and also for divers materials and other necessary things to the said plaintiff found, provided, used, and applied in and about that work, at the special instance and request of the said defendant; and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, done, performed, and bestowed divers other work and labor, care and diligence, in and about the business of the said defendant, and for the said defendant, and had before that time found, provided, used, and applied divers other materials and other necessary things in and about that business, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay the said plaintiff so much money as the said plaintiff reasonably deserved to have of the said defendant for the same, when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that the said plaintiff therefore reasonably deserves to have of the said defendant for the same the further sum of two hundred thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the sum of two hundred thousand dollars, of like lawful money as aforesaid, for divers, goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the like request of the said defendant; and in the further sum of two hundred thousand dollars, of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers others sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiff in the further sum of two hundred thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant ha' hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of two hundred thousand dollars, and therefore the said plaintiff brings suit, &c.

CARYS & COTTRILL,
Plaintiff's Attorney.

35 And same day, (August 5, 1872,) "on motion of Carys & Cottrill, plaintiff's attorneys, ordered that the defendant plead to the plaintiff's declaration on file by the first Monday of September next, or his default will be entered."

Plea.

AUGUST 24, 1872.—This day came the defendant, by Levi Hubbell, U. S. district attorney, and filed his plea, as follows:

Circuit court U. S., eastern district of Wisconsin.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
GEORGE Q. ERSKINE.

And now comes the defendant in this action, by Levi Hubbell, United States attorney, and defends the wrong and injury, when, &c., and says that hə did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against him. And of this he puts himself upon the country; and the plaintffs do the like, &c.

LEVI HUBBELL,
U. S. Atty.

36 And afterwards, to wit, at a stated term of said court begun and held according to law, at the city of Milwaukee, on the first Monday (being the seventh day) of October, A. D. 1872, on the fifteenth day of said term, to wit, on the twenty-third day of Ocbober, A. D. 1872, present the honorable Thomas Drummond, circuit judge, presiding, and the Hon. Andrew G. Miller, district judge, the following proceedings were had, to wit:

First trial.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs. } At law.
GEORGE Q. ERSKINE.

This day came the parties by their counsel, Mr. John W. Cary appearing for the plaintiff, and Levi Hubbel, the district attorney, for the defendant, and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, tō wit, Nathan Brick, Sereness S. Herring, Nathan G. Storrs, James Clark, John James, James Siddell, Enos Gay, John Ewing, Sylvester T. Webb, John Hayden, George Allen, and Edward L. Cary, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled, and the trial not being concluded, the same was adjourned until to-morrow morning.

37 And afterwards, to wit, on the sixteenth day of said term, to wit, on the twenty-fourth day of October, A. D. 1872, the following proceedings were had, to wit:

Verdict.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
GEORGE Q. ERSKINE.
} At law.

This day came the parties, by their counsel, and the trial of the issue herein was resumed. And the jurors of the jury aforesaid, being charged by the court, on their said oaths, respectively, do say, that the defendant did assume and promise in manner and form as the plaintiff hath herein declared against him, and assess the damages to the said plaintiff at the sum of one hundred and forty-four thousand and ninety-five dollars and twenty-five cents. And came the defendant, by his counsel, and moved the court for a new trial for reasons filed, as follows:

Motion for new trial.

Circuit court of the United States, eastern district of Wisconsin.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY
38 *vs.*
GEORGE Q. ERSKINE.

And now comes the defendant in the above-entitled action, by Levi Hubbell, his attorney, and attorney of the United States, and moves the court now here for an order granting a new trial in said action, on the ground and for the reason that the verdict rendered by the jury therein is not warranted by the law and the evidence in the case.

Dated Oct. 24th, 1872.

LEVI HUBBELL,
U. S. Atty.

And afterwards, to wit, at a special term of said court begun and held at the city of Milwaukee, on the second Monday (being the fourteenth day) of April, A. D. 1873, and on the fourteenth day thereof, to wit, on the fifth day of May, 1873, the following proceedings were had, to wit:

Order granting new trial.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
GEORGE Q. ERSKINE.
} At law.

This day the motion of the defendant for a new trial came on to be heard, and was submitted by Mr. Cary, for the plaintiff, and by

39 Mr. Hubbell, district attorney, for the defendan ; on consideration whereof it is ordered by the court that a new trial be and hereby is granted, the costs to abide the final result.

Term.

And now, at this same term, to wit, January term, A. D. 1874, and on the fourth day thereof, to wit, on the eighth day of January, A. D. 1874, present and presiding the honorable James H. Howe, district judge, the following proceedings were had, to wit:

Trial & verdict.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs. } At law.
GEORGE Q. ERSKINE.

This day came the parties by their counsel, Mr. John W. Cary appearing for the plaintiff, and Levi Hubbell, the district attorney, for the defendant, and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, to wit, William H. Bell, Lyndsey J. Smith, Miles Burnham, Merritt S. Barrett, R. W. Patterson, Hiram Sawyer, Chester Hazen, James O. Bartlett, Washington O. Stillman, George West, Heber B. Pearson, and Alexander Spence, twelve free, honest, and lawful men of the district, who were severally sworn
40 and empannelled. And the jurors of the jury aforesaid being charged by the court, on their said oaths, respectively, do say that the defendant did assume and promise in manner and form as the plaintiff hath herein declared against him, and assess the damages to the said plaintiff at the sum of three thousand six hundred and fifty-five dollars and seven cents.

Judgment.

Whereupon it is considered and adjudged by this court now here that the said plaintiff do have and recover of the said defendant, George Q. Erskine, the sum of three thousand six hundred and fifty-four dollars and seven cents damages, so as aforesaid assessed by the jury, together with forty-one dollars and seventy-eight cents, its costs about its said suit in this behalf by it expended, and that it have execution therefor.

Judgment-roll signed January 8th, A. D. 1874.

EDWARD KURTZ, *Clerk.*

Damages	$3,655 07
Costs	41 78
	$3,696 85

Judgment-roll filed January 8th, A. D. 1874, at five o'clock p. m.

EDWARD KURTZ, *Clerk.*

Bill of exceptions of plaintiff.

JANUARY 10, 1874.—Plaintiff's bill of exceptions signed and filed, as follows:

United States circuit court, eastern district of Wisconsin.

41 THE MILWAUKEE & ST. PAUL RAILWAY Company
vs.
GEORGE Q. ERSKINE, COLLECTOR, &C.

Afterwards, to wit, on the 8th day of January, 1874, at a term of said court begun and held at the United States court-room, in the city of Milwaukee, on the 5th day of January, 1874, the issues joined in the above-entitled action came on to be tried before the Hons. James H. Howe and James C. Hopkins, district judges, the above-named plaintiff, The Milwaukee & St. Paul Railway Company, appearing by John W. Cary, esq., its counsel, and the above-named defendant, George Q. Erskine, appearing by Levi Hubbell, esq., his counsel, and a jury was duly impannelled, chosen, and sworn.

The plaintiff, to maintain and prove the issues on its part, produced and read in evidence a stipulation in the words and figures following, to wit:

It is hereby agreed and stipulated by and between the parties to this action as follows:

First. The defendant admits all the allegations in the plaintiff's complaint so far as they set forth matters of fact.

Second. It is admitted by the plaintiffs that the dividends de-
42 clared by the company on the 19th of January, 1870, were out of
the earnings, profits, and income of the company, received by it during the year 1869 and prior to that time; also that the following return was made by the plaintiff to the assessor of the first internal-revenue district of Wisconsin, July 9th, 1870:

"AUDITOR'S OFFICE,
"MILWAUKEE & ST. PAUL RAILWAY COMPANY,
"*Milwaukee, July 9th,* 1870.

"Hon. GEO. B. GOODWIN,
"*United States Assessor First District Wisconsin:*

"DEAR SIR: On the 19th day of January, 1870, the board of directors of the Milwaukee and St. Paul Railway Company declared a dividend payable in cash, on the 15th day of February, on preferred stock, of $7.00 per share, and of $3.00 per share on common stock.

"On the 14th day of February, 1870, a dividend of $3.00 per in common stock to the preferred stockholders, and of $7.00 per share to the common stockholders, as follows:

"DIVIDEND IN CASH.

On preferred stock, 9,744,599.20, @ 7%	$682, 121 94
On common stock, 7,665,250.50, @ 3 %	$229, 957 52
	$912, 079 46

5 % of cash dividend, $45,603.97.

"DIVIDEND IN STOCK.

43 On preferred stock $9,744,599.20, @ 3%, nominal value is....................	$292, 337 28
On common stock $7,665,250.50, @ 7 %, nominal value is..	536, 567 53
	$828, 904 81

JAMES P. WHALING.
Auditor.

Sworn and subscribed before me this 9th day of July, A. D. 1870.
CHARLES D. STONER,
Assistant Assessor 6th Division, First District of Wisconsin.

I, James P. Whaling, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of all dividends declared due or paid by the said Milwaukee & St. Paul Railway Company from February 16th, 1869, to February 15th, 1870, both days inclusive.

JAMES P. WHALING.

Sworn and subscribed before me this 14th day of August, 1861.
CHARLES D. STONER,
Assistant Assessor.

The following endorsements are thereon written:

"OFFICE OF THE UNITED STATES
"ASSESSOR OF INT. REV.,
"*First District of Wisconsin.*

"This office requires you to make return on the within form of all dividends declared upon the earnings of the Milwaukee & Saint Paul Railway Company for the year 1869, said return to be made on or before July 10th, 1870.

44 "GEORGE B. GOODWIN,
"*Assessor 1st Dist. Wisconsin, B. K. A.*

"To the auditor of the Milwaukee & St. Paul Railway Co."

"To the assessor:

"This return is made in pursuance of your official requirements, but I respectfully insist that there is no law authorizing you to make such requirement, and therefore protest against making the same.

"Dated Milwaukee, July 9th, 1870.

"JAMES P. WHALING,
"*Auditor.*"

The defendant also offers in evidence and the plaintiff admits that the following return was made by the plaintiff:

UNITED STATES INTERNAL REVENUE.

Return of railroad, canal, and turnpike companies of the amount of interest paid on bonds or other evidences of indebtedness, with the amount of taxes withheld. (Section 122, act June 30, as amended July 13, 1868.) To be made to the assistant assessor on or before the 10th day of the month following that in which the interest became due and payable, the taxes to be paid to the collector on or before the last day of the month.

45 Account of all interests maturing, or bonds or other evidences of indebtedness, together with the amount of tax thereon, with-

held from the person to whom said interest was paid pursuant to the provisions of the internal-revenue laws, by the officers of the Milwaukee & St. Paul Railway Company, of Milwaukee, in the first collection-district of Wisconsin, from the second day of July, 1869, to the first day of January, 1870, both days inclusive.

Interest on bonds and other evidences of indebtedness:

$615,520, 5 per cent	$30,776

(Signed) R. D. JENNINGS,
Treasurer.

I, R. D. Jennings, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing on bonds and other evidences of indebtedness during the time aforesaid, and of the taxes withheld according to the provisions of law.

(Signed) R. D. JENNINGS,
Treasurer.

Subscribed and sworn before me this 14th day of January, 1871.
CHARLES D. STONER,
Assistant Assessor.

In reference to the above paper it is admitted that the sum of
46 $17,296.12 of the $30,776 mentioned in this paper was the five per
cent. paid to the Government on coupons which matured on first
day of January, 1870, being the sum claimed to be recovered in the first count in the declaration, and that the balance of the tax in said return is not contested, it being for coupons that matured before the first of January, 1870.

JOHN W. CARY,
Plaintiff's Attorney.
LEVI HUBBELL,
U. S. Attorney.

And after argument by counsel the said circuit court did then and there charge and instruct said jury—

That the said plaintiff was not entitled to recover for any of the said several sums mentioned in the complaint, except for the sum of $381.51 of the penalty mentioned in the fifth cause of action, being the amount said penalty exceeds the sum of $1,000, and also for the sum of $2,761.02, the interest mentioned in the sixth cause of action in said complaint, and that said plaintiff was entitled to recover for the said sums of $2,763.02, mentioned in said sixth cause of action, and the said sum of $381.51, in said fifth cause of action mentioned, and interest thereon
from the 13th day of September, A. D. 1871.

47 And the said plaintiff's counsel did then and there except to
said instruction so far as it denied the right of the said plaintiff
to recover in this action for the several sums named in the complaint.

And because none of the said testimony, rulings, decisions, exceptions, or stipulations appear in the record of the proceedings in said cause, the same are hereby made matter of record, and for that purpose the said district judges who tried said cause at the request of the said plaintiff, Milwaukee & St. Paul Railway Company, have hereto set their seals and subscribed their names this 9th day of January, A. D. 1874.

JAMES H. HOWE, [SEAL.]
Dist. Judge, Presiding.
J. C. HOPKINS, [SEAL.]
Ass't Judge.

FEBRUARY 17, 1874.—This day came the defendant, by his counsel, the district attorney, and on his motion it is ordered by the court that he be and hereby is allowed twenty days from this date to file a bill of exceptions.

FEBRUARY 28, 1874.—Defendant's bill of exceptions signed and filed as follows:

48 *Defendant's bill of exceptions.*

United States circuit court, eastern district of Wisconsin.

THE MILWAUKEE & ST. PAUL RAILWAY Company
vs.
GEORGE Q. ERSKINE, COLLECTOR, &C.

Be it remembered that on the 8th day of January, 1874, at a term of said court begun and held at the United States court-room, in the city of Milwaukee, on the 5th day of January, 1874, the issues joined in the above-entitled action came on to be tried before the Hon. James H. Howe, district judge, and James C. Hopkins, acting circuit judge, the above-named plaintiff, The Milwaukee & St. Paul Railway Company, appearing by John W. Cary, esq., its counsel, and the above-named defendant, George Q. Erskine, appearing by Levi Hubbell, esq., his counsel, and a jury was duly impanneled, chosen, and sworn. The plaintiff, to maintain and prove the issues on its part, produced and read a stipulation in the words and figures following, to wit:

It is hereby agreed and stipulated by and between the parties to this action as follows:

First. The defendant admits all the allegations in the plaintiff's
49 complaint so far as they set forth matters of fact.

Second. It is admitted by the plaintiff that the dividends declared by the company on the 19th day of January, 1870, were out of the earnings, profits, and income of the company, received by it during the year 1869 and prior to that time; also, that the following return was made by the plaintiff to the assessor of the first internal-revenue district of Wisconsin, July 9th, 1870:

"AUDITOR'S OFFICE MILWAUKEE &
" ST. PAUL RAILWAY COMPANY,
" *Milwaukee, July 9th,* 1870.

" HON. GEO. B. GOODWIN,
" *United States Assessor, First District Wisconsin:*

" DEAR SIR: On the 19th day of January, 1870, the board of directors of the Milwaukee & St. Paul Railway Company declared a dividend, payable in cash on the 15th day of February, on preferred stock, of $7.00 per share, and of $3.00 per share on common stock.

"On the 14th day of February, 1870, a dividend of $3.00 per share in common stock to the preferred stockholders, and of $7 00 per share to the common stockholders, as follows:

"DIVIDEND IN CASH.

On preferred stock, $9,744,599.20, @ 7 %	$682, 121 94
On common stock, $766, 250 50, @ 3 %	$229, 957 52
50	$912, 079 46

5 % of cash dividend, $45,603.97.

"DIVIDEND IN STOCK.

On preferred stock, $9, 744,299.20, @ 3 %, nominal value is	$292, 337 28
On common stock, $7,665,250.50, @ 7 %, nominal value is	$536, 567 53
	$828, 904 81

JAMES P. WHALING,
Auditor.

Sworn & subscribed before me this 9th day of July, A. D. 1870.
CHARLES D. STONER,
Assistant Assessor 6th Division, First District of Wisconsin.

I, James P. Whaling, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of all dividends declared due or paid by the said Milwaukee & St. Paul Railway Company from February 16th, 1869, to February 15th, 1870, both days inclusive.

JAMES P. WHALING,
Auditor.

Sworn and subscribed before me this 14th day of August, 1871.
CHARLES D. STONER,
Assistant Assessor.

The following endorsements are thereon written:

"OFFICE OF THE UNITED STATES ASSESSOR OF INT. REV.,
"*First District of Wisconsin.*

51 "This office requires you to make return on the written form of all dividends declared upon the earnings of the Milwaukee & St. Paul Railway Company for the year 1869; said return to be made on or before July 10th, 1870.

"GEORGE B. GOODWIN,
"*Assessor 1st Dist. Wisconsin, B. K. A.*

"To the auditor of the Milwaukee & St. Paul Railway Co."

"To the assessor:

"This return is made in pursuance of your official requirements, but I respectfully insist that there is no law authorizing you to make such requirements, and therefore protest against making the same.

"Dated Milwaukee, July 9th, 1870.

"JAMES P. WHALING,
"*Auditor.*"

The defendant also offers in evidence, and the plaintiff admits, that the following return was made by the plaintiff:

UNITED STATES INTERNAL REVENUE.

Return of railroad, canal, and turnpike companies of the amount of interest paid on bonds or other evidences of indebtedness, with the amount of taxes withheld. (Section 122 act June 30th, 1864, as amended July 13th, 1868.) To be made to the assistant assessor on or before the 10th day of the month following that in which
52 the interest becomes due and payable, the taxes to be paid to the collector on or before the last day of the month.

Account of all interest maturing on bonds or other evidences of indebtedness, together with the amount of tax thereon from the person to whom said interest was paid, pursuant to the provisions of the internal-revenue laws, by the officers of the Milwaukee & St. Paul Railway Company of Milwaukee, in the first collection-district of Wisconsin, from the second day of July, 1869, to the 1st day of January, 1870, both days inclusive.

Interest on bonds and other evidences of indebtedness:

$615,520, 5 per centum $30, 776

(Signed) R. D. JENNINGS,
Treasurer.

I, R. D. Jennings, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing on bonds or other evidence of indebtedness during the time aforesaid, and of the taxes withheld, according to the provisions of law.

(Signed) R. D. JENNINGS,
Treasurer.

Subscribed and sworn before me this 14th day of January, 1871.

CHARLES D. STONER,
Assistant Assessor.

53 In reference to the above paper, it is admitted that the sum of $17,296.12 of the $30,776 mentioned in this paper was the five per cent. paid to the Government on coupons which matured on first day of January, 1870, being the sum claimed to be recovered in the first count in the declaration, and that the balance of the tax in said return is not contested, it being for coupons that matured before the first of January, 1870.

JOHN W. CARY,
Plaintiff's Attorney.
LEVI HUBBELL,
U. S. Attorney.

And after argument by counsel the said circuit court did then and there charge and instruct said jury:

That the said plaintiff was not entitled to recover for any of the said several sums mentioned in the complaint except for the sum of $381.51 of the penalty mentioned in the fifth cause of action, being the amount said penalty exceeds the sum of $1,000; and also for the sum of $2,763.02, the interest mentioned in the sixth cause of action in said complaint; and that said plaintiff was entitled to recover for the said sums of

$2,763.02, mentioned in said sixth cause of action, and the said sum of $381.51, in said 5th cause of action mentioned, and interest thereon from the 13th day of September, 1871.

54 And the said defendant's counsel did then and there except to said instruction so far as it declared the right of the said plaintiff to recover in this action for the sums of $381.50 and $2,763.02 and interest thereon.

And because none of the said testimony, rulings, decisions, exceptions, or stipulations appear in the record of the proceedings in said cause, the same are hereby made matter of record, and for that purpose the said judge, who tried said cause at the request of the said defendant, George Q. Erskine, collector, &c., have hereto set their seals and subscribed their names this 28th day of February, A. D. 1874.

JAMES H. HOWE, [SEAL.]
Judge.

Præcipe for writ of error.

And same day (February 28, 1874) came the district attorney and filed his præcipe for writ of error, as follows:

Circuit court U. S., eastern dist. Wisconsin.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
GEORGE Q. ERSKINE.

The defendant in this action having filed a bill of exceptions in this action duly signed by the presiding judge, you are hereby requested to issue a writ of error therein, in the usual form, on behalf of the defendant.

Yours, &c.,

LEVI HUBBELL,
U. S. Atty. and Deft.'s Atty.

To ED'D KURTZ, Esq.,
Clerk Cir. Court.

Whereupon a writ of error and citation issued and a copy of said writ of error lodged for the defendant in error.

55 OCTOBER 10, 1874.—This day came John W. Cary & Melbert B. Cary, and filed their bond in the sum of two hundred and fifty dollars, conditioned that the plaintiff shall prosecute a writ of error to effect and answer all damages & costs if it fail to make good its plea, which bond is approved by the district judge, and is as follows:

Bond on appeal.

Know all men by these presents that we, John W. Cary & Melbert B. Cary, both of the city of Milwaukee & State of Wisconsin, are held and firmly bound unto George Q. Erskine, in the full and just sum of two hundred and fifty dollars, to be paid to the said Geore Q. Erskine, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between the Milwaukee & St. Paul Railway Company, plaintiff, and George Q. Erskine, defendant, judgment was rendered against the said defendant for only a portion of the plaintiff's claim, and the said Milwaukee 56 & St. Paul Railway Company, plaintiff, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said George Q. Erskine citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October inst.:

Now, the condition of the above obligation is such, that if the said Milwaukee & St. Paul Railway Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

JOHN W. CARY. [L. S.]
MELBERT B. CARY. [L. S.]

Sealed and delivered in presence of—
L. B. JUNEAU.

Approved by—
JAMES H. HOWE,
District Judge.

Whereupon a writ of error and citation issued and a copy of said writ of error lodged for the defendant in error.

57 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of the Milwaukee & St. Paul Railroad Company against George Q. Erskine.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this twelfth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety ninth.

[SEAL.] EDWARD KURTZ, *Clerk.*

58 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Milwaukee & St. Paul Railway Company, plaintiff, and George Q. Erskine, defendant, a manifest error hath happened, to the great damage of the said George Q. Erskine, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Nathan Clifford, first associate justice of the said Supreme Court of the United States, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the 98th.

EDWARD KURTZ,
Clerk U. S. Circuit Court East'n Dist. of Wisconsin.

Filed February 28, 1874.
EDW. KURTZ,
Clerk U. S. Circuit Court East'n Dist. Wisconsin.

59 The United States of America to Milwaukee & St. Paul Railway Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein George Q. Erskine is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable James H. Howe, district judge of the United States for the eastern district of Wisconsin, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred seventy-four, and of our Independence the ninety-eighth.

JAMES H. HOWE,
Judge.

I accept service of above citation this 26th day of September, A. D. 1874.

JOHN W. CARY,
General Solicitor.

60 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The Milwaukee & St. Paul Railway Company, plaintiff, and George Q. Erskine, defendant, a manifest error hath happened, to the great damage of the said The Milwaukee & St. Paul Railway Company, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October instant, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

EDWARD KURTZ,
Clerk U. S. Circuit Court Eastern Dist. of Wisconsin.

Filed October 10, 1874.

EDWARD KURTZ,
Clerk U. S. Circuit Court E. Dist. Wis.

61 The United States of America to George Q. Erskine, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October instant, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein The Milwaukee and St. Paul Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable James H. Howe, district judge of the United States for the eastern district of Wisconsin, this tenth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth.

JAMES H. HOWE,
District Judge.

I accept service of above citation this tenth day of October, A. D. 1874.

LEVI HUBBELL,
Dist. Atty. United States.

(Indorsement on cover:) No. 178. George Q. Erskine, collector of internal revenue, plaintiff in error, vs. The Milwaukee & St. Paul Railway Company, No. 179, and The Milwaukee & St. Paul Railway Company, plaintiff in error, vs. George Q. Erskine, collector of internal revenue. E. Wisconsin C. C. U. S. Filed 17th October, 1874.

Supreme Court of the United States.

October Term, 1876, Nos. 178 and 179.

GEORGE Q. ERSKINE, Collector of Internal Revenue,
Plaintiff in Error,
vs.
THE MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Plaintiff in Error,
vs.
GEORGE Q. ERSKINE, Collector of Internal Revenue,
Defendant in Error.

BRIEF AND POINTS.

JOHN W. CARY,
Of Counsel, for Milwaukee & St. Paul Railway Co.

Supreme Court of the United States.

OCTOBER TERM, 1876—Nos. 178, 179.

178.

GEORGE Q. ERSKINE, Collector of Internal Revenue,

Plaintiff in Error,

against

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY.

179.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Plaintiff in Error,

against

GEORGE Q. ERSKINE, Collector of Internal Revenue.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

This action was commenced by the Milwaukee & St. Paul Railway Company, in 1872, in the Circuit

Court of Milwaukee county, in the State of Wisconsin, against George Q. Erskine, then Collector of Internal Revenue, to recover back the amount of certain internal revenue taxes paid under protest by the plaintiff below in the year 1870, amounting to the sum of over $140,000. The cause was removed into the Circuit Court of the United States for the Eastern District of Wisconsin by the defendant below. (Record, pp. 1 to 5.) The declaration is found on pages 5 to 14 of record, and the plea on page 14.

A trial was had at October Term, 1872, before Judges Drummond and Miller, and a verdict for plaintiff rendered for $144,095.25. (Record, pp. 14 and 15.) This verdict was subsequently set aside by the court and a new trial granted, (record, p. 15,) and at the second trial there was a verdict for the plaintiff for $3,655.07. (Record, p. 16.) Each party filed exceptions and prosecuted writs of error. The bill of exceptions filed by the plaintiff below is found on pages 17 to 20, record; that of the defendant below is found on pages 20 to 23.

The principal question involved in the suit, and the only one involved in the bill of exceptions filed and writ of error prosecuted by the plaintiff below, was decided by this court in the case of Barnes vs. Railroad, 17 Wallace, 294, adversely to the plaintiff in error—Milwaukee & St. Paul Railway Company—and as I understand the decisions then given, although by a divided court, are regarded as finally settling the question involved. I do not for that reason desire to further prosecute the writ of the plaintiff below—the Milwaukee & St. Paul Railway Company—and if correct as to the effect of that decision, I consent that said writ of error may be dismissed.

The only question involved in the exceptions and writ of error of the defendant below, Erskine, is as to the correctness of the judge's charge, (record, pp. 22 and 23,) which was in these words, viz:

"That the said plaintiff was not entitled to recover for any of the said several sums mentioned in the complaint except for the sum of $381.51 of the penalty mentioned in the fifth cause of action, being the amount said penalty exceeds the sum of $1,000; and also for the sum of $2,763.02, the interest mentioned in the sixth cause of action in said complaint; and that said plaintiff was entitled to recover for the said sums of $2,763.02, mentioned in said sixth cause of action, and the said sum of $381.51, in said fifth cause of action mentioned, and interest thereon from the 13th day of September, 1871.

And the said defendant's counsel did then and there except to said instruction so far as it declared the right of the said plaintiff to recover in this action for the sums of $381.51 and $2,763.02, and interest thereon."

The portion of the declaration upon which the recovery was had and to which this exception relates, commences with the last line of page 10 of record and ends near the bottom of page 12. The cause of action as therein stated, is, that plaintiff was a corporation; that in January, 1870, it declared a dividend on its stock to the amount of $828,906, payable in February, 1870, in the common stock of the company; that the assessor of internal revenue assessed upon plaintiff an income tax of five per centum in respect to the aforesaid dividend, amounting to the sum of $41,445.30; that plaintiff appealed to the commissioner of internal revenue from said assessment, July 30, 1870, and that said appeal was entertained and held under advisement until March 16th, 1871, when a decision was made reducing said assessment to the sum of $27,630.20; that notice of said decision was given to plaintiff March 20th, 1871, that said amount would be payable on or before March 31st, 1871; that payment was not made *until the 31st day of May, 1871, by reason whereof said defendant, as such collector as aforesaid, imposed a penalty of five per centum of the amount of said last mentioned pretended tax upon said plaintiff, amounting to $1,381.51, and as such collector also charged said plaintiff with ten months' interest on said last mentioned pretended tax at the rate of twelve per centum per annum, which said interest amounted to the sum of $2,763.02, whereas there was no law authorizing said defendant, as such collector, to impose said penalty or charge said interest; that plaintiff protested, but was compelled to pay, and did pay said penalty and interest amounting to $4,144.53, and that plaintiff appealed to the commissioner to have the same re-*

funded, &c., and his petition was refused and suit, &c. The recovery was for the amount of said penalty and interest, less the sum of $1000.

I.

The instruction of the court below was correct and the judgment should be affirmed.

The only penalty, imposed by the internal revenue laws, upon a railroad company "for default in making or rendering lists or returns with the declaration annexed as provided, *or in making payment of the duty or tax*," is a penalty of $1000. Therefore the collector was not authorized to impose a penalty of five per centum of the amount of tax, or interest, at the rate of twelve per cent. per annum.

Section 122 of an act to provide ways and means for the support of the government and for other purposes, approved June 30th, 1864, 13 Statutes at Large, 284, imposes the tax and fixes the penalty for default in payment, and the penalty there provided is exclusive, and the only one that could be lawfully imposed, and is in these words: "And for any default in making or rendering such list or return, with the declaration annexed, or *of the payment of the duty as aforesaid*, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the duty, or any part thereof as aforesaid, the assessment and collection of the duty and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

This section was amended and re-enacted in 1866—14 Statutes at Large, 138–9—but the same penalty, and the same language above quoted is retained.

A specific penalty is provided for this default, and no other penalty than the one named can be enforced. There was no authority to impose a penalty of five per cent. Therefore, the judge's charge was correct, that only $1000 should have been collected as a penalty for the default.

There was no authority for compelling the Company to pay interest on the amount of the tax assessed at twelve or any other per cent. There was no such provision in section 122, or applicable to such a tax. The amendment of March 2d, 1867—14 Statutes at Large, 480—authorizes the addition of one per cent. per month for failure to pay taxes on incomes as provided by section 119 of the original act, but it has no application to taxes assessed under section 122, and we are not aware of any statute which authorized the imposition of this amount as interest for the non-payment of the tax in this case. The charge was, correct in regard to this item, and the judgment should therefore be affirmed.

JOHN W. CARY,
Of Counsel for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

GEO. Q. ERSKINE, COLLECTOR, PLAINTIFF IN ERROR,
vs.
MILWAUKEE AND ST. PAUL RAILWAY COMPANY.
No. 178.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

(No. 179 is a cross-appeal in the same cause.)

Brief for the Collector.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

GEO. Q. ERSKINE, COLLECTOR, PLAINTIFF in error, *vs.* MILWAUKEE & ST. PAUL RAILWAY Company.	No. 178.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

(No. 179 is a cross-appeal in the same cause.)

BRIEF FOR THE COLLECTOR.

STATEMENT.

The above-named corporation, existing under the laws of Wisconsin and doing business at Milwaukee, there brought this suit against Mr. Erskine, collector of internal revenue for the first collection-district of that State, alleging in the declaration, filed August 5, 1872, that the company was indebted to divers persons in large sums upon bonds issued or assumed by said corporation and a lien upon its property, and on which it was obliged to pay the interest; that the interest-coupons falling due and for which provision had to be made January 1, 1870, amounted to $345,922.50, on which they were assessed by the United States assessor for that district an income-tax of 5 per cent., amounting to

$17,296.12, the validity of which tax it denied, and paid the same under protest February 28, 1870, to said Erskine as collector; that appeal was taken to the Commissioner of Internal Revenue September 26, 1871, and decided by him adversely to the company January 29, 1872, and this suit was brought within six months thereafter to recover said sum so paid.

The next count alleged similar facts and action as to the assessment of the coupons falling due July, 1870, amounting to $31,105.70.

The third count was for the tax assessed upon its dividends payable in 1870, the taxes being $45,603.95 on the cash dividend payable February 15, 1870. The fourth set out the declaration of a stock dividend at par declared January 19, 1870, payable February 14, 1870, amounting (at par) to $828,906, taxed at 5 per cent., being $41,445.30; which tax was reduced, on appeal to the Commissioner, $27,630.20, the cash value ($502,604) of the stock being substituted for its par as the basis of taxation, the corporation protesting against the legality of any assessment.

The next count sets forth the matter which we understand to be now contested; that the company were notified March 20, 1871, that the Commissioner of Internal Revenue had decided (as aforesaid) upon their appeal that a tax of $27,630.20 was assessable upon the stock dividend, and that it must be paid to the collector on or before the last day of that month; that it was not paid till May 31, 1871, by reason whereof Mr. Erskine, as collector, exacted payment of a 5 per cent. penalty, amounting to $1,381.51, and also charged ten months' interest, at 12 per cent. per annum upon said tax, amounting to $2,763.02, the aggregate paid as penalty and interest thus being $1,144.53. Protest, appeal, and seasonable institution of this suit were averred as to all these collections and payments. (Record, 5–12.)

At the first trial verdict for $144,095.25 was given. (Record, 15.) This was set aside, and the second trial resulted in a verdict for $3,655.07. (Record, 16.) Both parties dispute the legal correctness of this result.

The allegations of fact contained in the original plaintiffs' declaration are stipulated and agreed to be correct; and it is admitted that the dividends declared January 19, 1870, were payable out of the income, earnings, and profits of the company received prior to the first day of that month, and return was made of them by the original plaintiffs' auditor to the United States assessor of internal revenue July 9, 1870, under protest and in compliance with a demand therefor by that official; and return was also made of the interest-coupons paid as aforesaid. The original plaintiffs excepted to the ruling of the court that they could only recover the $381.51 excess of penalty exacted above $1,000 and the $2,761.02 interest, and were entitled to those sums; and the original defendant excepted to the ruling that the plaintiffs were entitled to recover to this extent. (Record, 17–23.)

Of the $30,776 assessed upon the interest coupons, it was admitted that $17,296.12 only was assessed upon coupons accruing January 1, 1870, and that the balance assessed upon interest due prior to that date could not be recovered, and was not contested. (Record, 22, folio 53.)

ASSIGNMENT OF ERRORS.

The plaintiff in error, George Q. Erskine, assigns for error so much of the ruling and instruction of the court

below as instructed the jury that the corporation was entitled to recover the $381.51 excess of penalty above $1,000 and the $2,763.02 interest upon the tax assessed as aforesaid on the stock dividend, the whole of said instruction being "that the said plaintiff was not entitled to recover for any of said several sums mentioned in the complaint, except for the sum of $381.51 of the penalty mentioned in the fifth cause of action, being the amount said penalty exceeds the sum of $1,000, and also for the sum of $2,763.02, the interest mentioned in the sixth cause of action in said complaint; *and that said plaintiff was entitled to recover for the said sums of* $2,763.02 *mentioned in said sixth cause of action and the said sum of* $381.51 *in said fifth cause of action mentioned, and interest thereon from the* 13*th day of September*, 1871." (Record, 22, 23.)

The plaintiff in error assigns for error the last four lines of said instruction, being those above indicated by italicization.

BRIEF.

The exceptions brought up in No. 179, being those taken by the original plaintiff in the court below, will be dismissed, with the remark that this court has determined, in Blake *v.* Banks, 23 Wall., 307; Stockdale *v.* Ins. Cos., 20 Wall., 323; Barnes *v.* R. Rs., 17 Wall., 294; and United States *v.* Balt. & O. R. R. Co., *id.*, 322, that they are not well taken.

The act of June 30, 1864, (c. 173, § 119, 13 Stats., 283,) as amended, (14 Stats., 480,) provided that "the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April in each year until and including the year 1870, and no longer. *And to any sums annually due and unpaid after the* 30*th of April, as aforesaid, and for ten* *days after notice and demand thereof by the collector, there shall be levied, in addition thereto, the sum of* 5 *per centum upon the amount of taxes unpaid, and interest at the rate of* 1 *per centum per month upon said tax from the time the same became due, as a penalty, except from the estates of deceased, insane, or insolvent persons.*"

The next section imposes a 5 per cent. tax on dividends, &c., of banking corporations, and requires a list or return to be made to the assessor of the proper district "on or before the 10th day of the month following that in which any dividends or sums of money become due and payable, as aforesaid." * * * * "And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default shall forfeit, as a penalty, the sum of $1,000; and in case of default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal."

Section 122 imposes the 5 per cent. tax on interest-coupons, dividends, &c., of any railroad, canal, &c., company, and upon all its profits, &c., of which interest dividends, &c., lists, or returns, supported by affidavit of their truth, are to be rendered the assessor on or before the 10th of the month succeeding that in which the interest, &c., becomes payable; "*and for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit, as a penalty, the sum of* $1,000; *and in case of default in making or ren-*

dering said list or return, or of the payment of the tax, or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal." (13 Stats., 285.)

It is noticeable that twice in this act it is declared that the word "person" shall include a corporation. In sec. 82, p. 258, it says "any word or words in this act indicating or referring to person or persons shall be taken to mean and include partnerships, firms, associations, or corporations, when not otherwise designated or manifestly incompatible with the intent thereof;" and the last sentence of sec. 126, p. 287, is that, for the purposes of this act, "the term 'person' shall be held to include persons, body-corporate, company, or association;" there being no such express qualification of this comprehensive declaration as is found in section 82.

Section 116 provides for the annual levy of a 5 per cent. tax upon the yearly gains, profits, and income of every person residing in the United States, derived from any kind of property, *except as hereafter mentioned;* and the next section (117) excepts those stocks and bonds provided for in sections 120 and 122, above cited, from the estimate of taxable income, so that it allows that one payment of 5 per cent. to be the whole national tax on this property; but it does not take corporations out of the very general language of the amendatory act of March 2, 1867, (c. 169, 14 Stats., 480,) that "to any sum or sums annually due and unpaid after the 30th of April, as aforesaid, and for ten days after notice and demand thereof by the collector, there shall be levied, in addition thereto, the sum of 5 per centum on the amount of taxes unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, as a penalty, except from the estates of deceased, insane, or insolvent persons."

There is no reason for imposing this, proportionately, much heavier penalty upon natural persons only, and allowing corporations with enormous incomes to delay the Government for years at an expense or penalty of only $1,000; whereas it would be very proper to impose this sum as an additional penalty upon such bodies, since they could not have the same excuse for an inadvertent delay that an individual might, there always being the proper officers at the corporate place of business having access to those books and documents which must be resorted to in order to make out the returns required by law.

EDWIN B. SMITH,
Assistant Attorney-General.

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